you for a few minutes by some remarks on the specific theme: "The relations between international tribunals of arbitration and the jurisdiction of national courts."

ADDRESS OF THE PRESIDENT OF THE SOCIETY, MR. ELIHU ROOT, OF WASHINGTON, D. C.

The growing tendency towards international arbitration brings into special consideration and importance the relation between the jurisdiction of national courts of justice and international tribunals of arbitration.

When one nation urges claims in behalf of its citizens upon the government of another nation and proposes arbitration, how far does that other nation's respect for its own independent sovereignty and for the integrity of its own judicial system require it to insist that the claims be submitted for final decision to its own national courts?

The true basis for the consideration of this question is in the nature of the obligation which constrains a nation to submit questions to any tribunal whatever.

That there is no legal obligation to make any submission, that is to say, that it is not required by any rule imposed by a superior power, is a corollary from our conception of sovereignty. Sovereignty involves the right to determine one's own actions — to pay or not to pay, to redress injury or not to redress it, at the will of the sovereign, subject only to the necessary conditions created by the existence of other equally independent states. So far as questions arise out of contract, Alexander Hamilton states the strongest view of national freedom from restraint in a passage often quoted in recent years:

> Contracts between a nation and private individuals are obligatory, according to the conscience of the sovereign, and may not be the object of compelling force. They confer no right of action contrary to the sovereign will.

So far as questions arise out of alleged wrongs by one government against a citizen of another, the sovereignty of one nation is merely confronted by another sovereignty, which is itself equally supreme

within its own limits. Wherever the true lines are to be drawn between two mutually exclusive sovereignties, each is supreme and subject to no compulsion on its own side of the line. Wherever there is infringement by one on the other there exists the right of adverse action, which involves no impeachment of independent sovereignty, but follows necessarily from the contact of two independent powers. Whatever modifications international lawyers urge to the broad statement of doctrine to which Doctor Calvo has given his name, so ably enforced by his successor, Doctor Drago, there is no effective dispute regarding the foundation of his main proposition, regarding the essential nature of sovereignty.

The conditions under which this sovereign power is exercised among civilized nations do, however, impose upon it important limitations, just as the conditions under which individual liberty is enjoyed in a free civil community impose limitations upon individual conduct in matters not at all controlled by law. Municipal law does not, in general, undertake to compel men to be virtuous, truthful, sober, fair, polite, and considerate of others. Yet the existence of civil liberty is conditioned upon the existence of a community standard of conduct quite independent of legal compulsion, and extending far beyond the limits touched by any statute. The member of a community who chooses to use his individual liberty to violate that standard conspicuously, meets severe punishment in the loss of respect, confidence, and esteem, and in the consequences of that loss. Another very effective limitation upon conduct is the knowledge that certain courses of conduct quite within one's legal rights may lead some other man to use his individual freedom, to do one injury. The compulsion which such considerations produce upon individual action is no more an infringement upon individual liberty than is the effect caused by the knowledge that fire will burn and water will drown. The individual in each case regulates his own conduct in accordance with his own will.

The assertion of independent sovereignty of nations is but another expression of the individual liberty of each nation in the community of nations. In its practical application it is of modern acceptance, superseding the old idea that each nation, tribe, or group of people

under whatever chieftain, leader, sovereign, or government, was entitled to hold such territory and exercise such control over its own conduct, as it could maintain by force of arms, and no more.

The theory of independent sovereignty, entitled to be respected by all mankind without regard to its power to maintain itself by force, could find no place in the world except in coincidence with a standard of international conduct to which the nations generally, in the exercise of their individual sovereignty, conform, each without compulsion of any other power, but voluntarily.

The chief principle entering into this standard of conduct is that every sovereign nation is willing at all times and under all circumstances to do what is just. That is the universal postulate of all modern diplomatic discussion. No nation would for a moment permit its own conformity to the standard in this respect to be questioned. The obligation which this willingness implies is no impeachment of sovereignty. It is voluntarily assumed as an incident to the exercise of sovereignty because it is essential to a continuance of the conditions under which the independence of sovereignty is possible. This obligation is by universal consent interpreted according to established and accepted rules as to what constitutes justice under certain known and frequently recurring conditions; and these accepted rules we call international law. No demand can ever be made by one nation upon another to give redress in any case but that the demand is met by an avowed readiness to do justice in that case, and upon that demand in accordance with the rules of international law. No compulsion upon sovereignty is needed to reach that result.

The only question that can arise upon such a demand is the question, "What is just in this case?" In that necessary condition of agreement upon the underlying principle to be followed, a common duty is presented to both nations to ascertain and determine what is just.

It is not usually a simple or easy thing to determine what is just as between a nation and either its own citizens or the citizens of other nations. Upon one conclusion all civilized nations are in accord — that the executive and administrative officers of government can not be depended upon to make such determinations. Civil-

ized nations uniformly provide machinery for judicial decision of such questions so that the views of executive and administrative officers in rejecting claims may be reviewed and controlled. The grant of jurisdiction to courts or the creation of courts to exercise such jurisdiction is no disparagement of the officers whose views of what is just are thus called in question. Sovereigns and presidents and ministers and department officers are not insulted by such provisions, or because the common sense of justice recognizes that their relation to the questions which arise between the government which they conduct, and others, is such that they can not well be impartial.

The whole system by which sovereign states permit themselves to be sued in courts vested with jurisdiction for that purpose is in recognition of the fundamental rule of right that none shall be a judge in his own case.

The same great rule cannot be ignored when the question is whether the decision of a national court is to be taken as a final and satisfactory determination of what is just in an international case, to which the judge's own country is a party. For after all judges are but men. They are part of the government that is called in question. They are subject to the influence of their environment. They can not always escape all the influences of popular feeling and prejudice in their own communities. The political fortunes of the very officials who appointed them to the bench or their own tenure of office may perhaps be at stake upon their action. They cannot help bringing to the bench strong tendencies and predilections in favor of their own countrymen's ways of acting and thinking. They desire the approbation of their fellow citizens, and in cases of public interest it may be much harder to decide against than for, their own country. It is difficult for a foreigner to understand and avail himself of their modes of reasoning, their rules of evidence and of procedure, and the precedents they follow. If there is a difference of languages a stranger is at a great disadvantage. He may often lose his case through not knowing how to do his part towards maintaining it.

There are many circumstances varying in different countries and in different cases which tend to strengthen or to weaken these

obstacles to a satisfactory attainment of justice. The general state of feeling in the country of trial towards the country of the complainant and its effect upon the atmosphere of the court room, that every experienced lawyer knows to be so important, is one of these circumstances. The relative importance of the case in proportion to the resources of the country — whether an adverse decision would make a slight or a great difference to the government or the people, is another. Whether the action of the executive has been generally discussed and has assumed political importance is another.

Every country is entitled to follow its own judgment and is not subject to criticism for following its own judgment, as to the degree of independence it shall give to its judiciary, yet it can not well be denied that with human nature as it is, there is less certainty of an impartial decision from judges removable at will in a case calling in question the acts of the appointing and removing power, than from judges whose tenure of office is not dependent upon the executive. The decision of such a dependent court is liable to be affected by the same infirmities which the whole world recognizes as making the determination of the executive itself, an unsatisfactory method of concluding the search for justice.

It should not be forgotten that it is not only desirable to have justice done; but also to have men believe that justice is done. That belief is important to respect for law among the people within each nation and to the maintenance and growth of respect and friendship between the peoples of different nations.

Of course there are many cases falling naturally into the ordinary routine of national judicial procedure — cases plainly not presenting the elements of prejudice which would prevent reaching justice through that procedure. Of course there are many great international questions which no one would ever propose to lay before a national tribunal. Between these two extremes there is a wide range of cases in which national courts may exercise jurisdiction, but to which the considerations that I have suggested apply. When such cases arise the international question is not one of compulsion or derogation from sovereignty, but it is: How shall two nations desiring to ascertain what is the truth of justice in this case reach a

decision? By what procedure and before what tribunal can that end best be attained?

If recourse to arbitration is a reflection upon national courts, the people of the United States have been strangely obtuse, for nowhere in the world, surely, is greater honor paid to the courts of justice, yet we have embodied in the fundamental law which binds our states together a recognition of the liability of courts to be affected by local sentiment, prejudice, and pressure. We have provided in the third article of the Constitution of the United States that in controversies between states or between citizens of different states the determination of what is just shall not be confined to the courts of justice of either state, but may be brought in the Federal tribunals, selected and empowered by the representatives of both states and of all the states — true arbitral tribunals in the method of their creation and the office they perform.

Alexander Hamilton explains this provision in *The Federalist* in these words:

> The reasonableness of the agency of the national courts in cases in which the state tribunals can not be supposed to be impartial, speaks for itself. No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the slightest interest or bias. This principle has no inconsiderable weight in designating the Federal courts as the proper tribunals for the determination of controversies between different states and their citizens. And it ought to have the same operation in regard to some cases between the citizens of the same state. Claims to lands under grants of different states founded upon adverse pretension of boundary are of this description. The courts of neither of the granting states could be expected to be unbiased. The laws may have even prejudged the question and tried the courts down to decisions in favor of the grant of the state to which they belonged. And where this has not been done it would be natural that judges as men should feel a strong predilection to the claims of their own government.

The whole world owes too much to the Constitution of the United States to think little of its example. Especially the American nations, which have drawn from that great instrument their forms of government and the spirit of their free institutions, must regard with respect the lesson which it teaches.

The proud independent sovereign commonwealths like Virginia

and Pennsylvania and New York and Massachusetts, which formed the American Union, revered their judges. They were prepared to give, and did give to their courts a degree of authority over them and over their executives and legislatures without precedent in the history of free government; but they also revered justice; they prized peace and concord and friendship and brotherhood between the states and their citizens. A century and a half of free self-government had brought to them the lessons and the self-restraint of experience. They knew the limitations of good men and the essential conditions of doing justice. In that great cause they allowed no small local jealousies to bar the way. When the ever-recurring question arises between submission of controversies to international arbitration on the one hand and insistence upon the jurisdiction of national tribunals on the other, the nations who look to the framers of the American Constitution as an example of high constructive statesmanship and wisdom, should not fail to find in this judgment, matter to arrest their attention and influence their action.

No court in the world has greater power and independence and honor than the Supreme Court, established under the Constitution of the United States, yet our government, by international agreement, has submitted to international tribunals many cases which could have been, and many cases which already had been, decided by that great court. For example, the cases of the Peterhof, reported in Wallace's Reports, Volume 5; the Dashing Wave (5 Wallace); the Georgia (7 Wallace); the Isabella Thompson (3 Wallace); the Pearl (5 Wallace); the Adela (6 Wallace), had all been decided by the Supreme Court, and they were resubmitted to an international tribunal, which decided them in the same way the court had decided them.

The cases of the Hiawatha (2 Black), the Circassian (2 Wallace), the Springbock (5 Wallace), the Sir William Peel (5 Wallace), the Volant (5 Wallace), the Science (5 Wallace), had all been decided by the Supreme Court, and they were resubmitted to an international tribunal, which decided them adversely to the decisions of the court, and the United States complied with the decisions of the arbitral tribunal.

It is true that the rule is undisputed that where there has been a denial of justice in national courts their decisions are not to be held conclusive, and arbitration or other further action may be called for. Unfortunately it has been necessary often in the past to invoke this rule; but it is an unsatisfactory rule and injurious in its effects. It involves an indictment and trial of the judicial system under which the denial of justice is alleged to have occurred. It involves aspersions upon government, imputations upon high officials, incitement to anger and resentment, and tends to destroy rather than to preserve good feeling and friendship between the nations concerned.

The better rule would be, to avoid the danger of denials of justice, and to prevent the belief that justice has not been done, which must always possess the parties defeated in a tribunal suspected of partiality, by submitting in the first instance to an impartial arbitral tribunal all such cases as are liable to be affected by the considerations I have mentioned.

And the reason of such a rule would require that when such cases have been decided already by national courts, and the impartial justice of the decision is seriously questioned, upon substantial grounds, they should be resubmitted to an arbitral tribunal, not for proof that justice has been denied, but for rehearing upon the merits because self respect and intelligent self-interest forbid a nation to shelter itself behind decisions of its own courts that rest under the imputation of partiality, or to be content with any but the best means and the most sincere effort to learn what is just in order that the nation may do what is just.

Mr. Root. Before proceeding with the regular programme, the Secretary wishes me to make the following announcements:

The President's reception to the Society will occur on Saturday afternoon at 1 o'clock, in the East Room of the White House, instead of at half-past two, which is the time stated in some of the programmes or circulars.

The Executive Council of the Society will meet this afternoon at half-past four in the Library near the F Street entrance of the hotel. The Society will hold its annual business meeting at half-past two Saturday afternoon in this room.

The Editorial Board of the Journal will meet at half-past four, Saturday afternoon, in the Library, near the F Street entrance of this hotel.

There should be an appointment of a nominating committee to suggest the name of some person suitable for election as honorary member for this year. The committee should report to the Executive Council at its meeting this afternoon. I do not recall how that committee is to be named. Is it your pleasure that the President shall name the committee?

A MEMBER. I move that that power be conferred upon the President.

Mr. ROOT. If there is no objection, the chair will exercise the power and name General Horace Porter, Hon John W. Foster, and Prof. N. Dwight Harris.

Members of the Society are urged to register at the desk in the rear of the room as early as possible, in order to secure their banquet tickets, and to obtain cards admitting them to the President's reception. It is necessary that the banquet tickets be secured at once, in order that the hotel may make preparations sufficient to cover the number who may come. These tickets must be secured to-day.

The topic for discussion this morning is: "Arbitration as a judicial remedy: an examination of concrete cases actually submitted and decided by arbitration: how far they are of a judicial character and how far they have been governed by diplomatic convenience."

The first speaker is Hon. John W. Foster.

ADDRESS OF MR. JOHN W. FOSTER, OF WASHINGTON, D. C.

Mr. President and Gentlemen of the Society: For the discussion of this morning, I was called upon at a late date to act as a substitute for a gentleman of high standing and a jurist of repute, whom it was hoped would take part in the discussion; and the disappointment in that regard explains my presence on the floor.

In the discussion of the topic set down for the session of this morning, I have been assigned the task of considering the British-